West Penn Power Company and the Potomac Edison Company d/b/a Allegheny Power and Allegheny Energy Supply Company, LLC, a single employer, and their agent Allegheny Energy Service Corporation[1] ***and*** **Utility Workers Union of America System Local 102, AFL–CIO.** Cases 6–CA–31003, 6–CA–31204, 6–CA–31400–2, and 6–CA–31623

July 11, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

This case involves the issue of whether the Respondent adequately responded to a series of information requests from the Union on six separate subject matters.[2] The General Counsel alleged that the Respondent either failed to provide necessary information or provided the information in an untimely manner. The judge found that the Respondent violated Section 8(a)(5) of the Act by failing to respond timely and failing to provide information regarding outside contractors; by failing to respond timely to a request for information regarding meters, customers, and meter readers in Cumberland and Oakland, Maryland; by failing to respond timely and failing to provide information regarding the Itron/Honeywell subcontract; and by making blanket claims of confidentiality in response to the Union's requests for information regarding employee Phil Cosner. The judge dismissed allegations that the Respondent violated Section 8(a)(5) by failing to respond timely and failing to provide information regarding foreign utilities, and by failing to respond timely and failing to provide information regarding resource sharing employees working 10-hour days.

Having considered the decision and the record in light of the exceptions and briefs, we agree with the judge's findings of violations concerning information about outside contractors and about the Itron/Honeywell subcontract. We also agree with his dismissal of the allegations about foreign utilities and about resource sharing employees working 10-hour days. We disagree with the judge's findings of violations concerning information about Cumberland and Oakland, Maryland, and about employee Phil Cosner. Therefore, we have decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order, and to adopt the judge's recommended Order as modified and set forth in full.[3]

I. INFORMATION REGARDING OUTSIDE CONTRACTORS

This alleged violation involves union requests for information regarding unit work performed by outside contractors. The judge found that the Respondent violated Section 8(a)(5) by failing to respond timely and failing to provide information. The judge stated that he was unclear about the extent of the Respondent's claims regarding the burdensomeness of the information request. Accordingly, he ordered that the parties bargain about the level of detail and time period of data to be provided. The Respondent has excepted to the judge's finding of the violation. The General Counsel and the Union have excepted to the judge's limited remedy.

We agree with the judge's finding that the Respondent violated the Act regarding this allegation for the reasons he set forth and for additional reasons discussed below. We disagree, however, with his remedy and find that the appropriate remedy is to provide the information, rather than to bargain over providing it.

A. Background

In 1977, the parties signed an agreement whereby the Respondent agreed to identify specific work performed and work locations for outside contractors doing ordinary maintenance and repair work normally performed by the Respondent's employees represented by the Union. For many years, the Respondent provided these reports to the satisfaction of the Union.

The outside contractor information is necessary for the Union to police its contract in two respects. First, the contract provided that unit work could be subcontracted only to the extent that the Respondent maintained a work force sufficient to perform the regular expected work of the Respondent. Second, the parties' most recent contract contained a "Resource Sharing" provision, under which unit employees may be sent to another site of the Respondent's to perform work for the Respondent. Re-

[1] At the hearing the parties stipulated that, for the purposes of this case only, all Respondents are to be treated as a single employer (collectively the Respondent).

[2] On May 10, 2001, Administrative Law Judge Jerry M. Hermele issued the attached decision. The Respondent filed exceptions and a supporting brief, an answering brief, and a reply brief; the General Counsel filed exceptions and a supporting brief, and an answering brief; and the Charging Party filed exceptions and a supporting brief, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

At fn.1 of his decision, the judge observed that upon publication, "unauthorized changes may have been made by the Board's Executive Secretary to the original Decision of the Presiding Judge." It is the Board's established practice to correct any typographical or other formal errors before publication of a decision in the bound volumes of NLRB decisions.

[3] We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language.

source sharing was intended to reduce the number of outside contractor jobs because the Respondent could move unit employees where they were needed. Additionally, the contract provided that where resource sharing was utilized, outside contractors would be used only as a last resort.

The Respondent's traditional contractor reports met the Union's needs by providing information, for the Union's entire geographic territory, listing the dates subcontracted work was performed, a description of the work, and the name of the contractor. For a year or so prior to the information requests at issue here, the Respondent shifted to a reporting form that listed locations, a broad description of the type of work, and contractor names. Although the form contained a column to identify the "number of men" used on the job, the Respondent routinely wrote "As Needed" in that space. The new form, therefore, did not identify what, if any, subcontracted work was performed. In 1999 and 2000, the Respondent provided information on selected service centers only.

On September 22 and November 1, 1999, March 7, July 6, and August 18, 2000, the Union requested detailed reports, like those it had previously received, regarding contractors and complained that reports were routinely being received untimely. The Respondent's answers to these requests asserted, variously, that it complied with the 1977 agreement, that it was providing the information it had on the subject, and that it would consider the feasibility of refining the form and substance of its reports. The Respondent never answered a direct question contained in the Union's March 7, 2000 letter about whether the failure to provide a monthly report for a given location indicated that there was no subcontracting. The Union's August 18, 2000 letter also requested, with specified breakdown categories, data processing information from 1994 to the present on amounts of contracting by dollar expenditure and numbers of work units. The Union explained that it was looking for trends in contractor use before and after collective-bargaining commitments were made regarding the use of resource sharing in exchange for limiting subcontracting.

B. Analysis

The judge found that the requested information was relevant based on the resource sharing provision in the parties' 1977 agreement. He also found the information was relevant to the Union's ability to negotiate a successor agreement. The Respondent has excepted to the judge's conclusions. We find no merit in these exceptions. In addition to the factors set forth in the judge's decision, we find the violations based on the following two reasons.

First, the Respondent contends that the 1977 agreement between the parties establishes the scope of the contractor information it is obligated to provide to the Union. The Respondent argues that although it historically gave the Union more information than was required by the 1977 agreement, it is not required to continue this practice. It contends that its more recent submissions of contractor information complies with that agreement. We find this argument unpersuasive. The 1977 agreement establishes a minimum level of contractor information that the parties agreed the Union is entitled to receive. The agreement does not, however, contain a clause eliminating the Union's right to request and receive other contractor information to which it is statutorily entitled. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435 (1967). In this case, where the Union was requesting the information to police its collective-bargaining agreement,[4] the Union was entitled to the information it sought.

Second, the parties were beginning to prepare for collective-bargaining negotiations for a new contract. The requested information relates directly to the Union's concerns with the maintenance of unit size and the general preservation of unit work. We find that the timing of the requests, as related to the upcoming negotiations, strongly supports the Union's need for the information. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(5) by its delay in furnishing the contractor information and by its failure to respond adequately to the Union's requests.

C. The Remedy

Turning to the judge's proposed remedy for this violation, we agree with the General Counsel and the Union that the appropriate remedy is to provide the information, rather than to bargain over providing the information. To the extent that the Respondent had valid claims of burdensomeness, it should have bargained with the Union over production of information at the time the information was requested. Having violated the Act by refusing to provide relevant and necessary information, the Respondent is now obligated to produce the information. Any issues regarding the burdensomeness of producing the information are appropriately handled in the compliance stage of this proceeding. See, e.g., *Safeway Stores, Inc.*, 252 NLRB 1323, 1324 (1980), enfd. 691 F.2d 953 (10th Cir. 1982).

[4] We note the judge's finding that the Union's motive for its requests were "crystal clear" to the Respondent.

II. INFORMATION REGARDING METERS, CUSTOMERS, AND METER READERS IN CUMBERLAND AND OAKLAND, MARYLAND

This alleged violation involves union requests for information regarding two service centers. The judge found that the Respondent violated Section 8(a)(5) by failing to timely provide the information. The Respondent has excepted to the judge's finding of the violation. We disagree with the judge's finding that the Respondent violated the Act regarding this allegation.

A. Background

The Respondent's meter readers at Oakland, Maryland, are represented by the Union. The meter readers at Cumberland, Maryland, are not unionized. In the summer of 1999, Oakland employees complained to the Union that Cumberland employees were not following proper procedures, thereby improving their productivity. The Oakland employees felt that this caused them to be compared unfavorably to Cumberland employees. On August 26, 1999, the Union sent a request for seven pieces of information, six of them requesting parallel data from both the Oakland and Cumberland service centers. The Union was attempting to see if the two groups had comparable workloads and followed similar procedures in performing their work.

On January 31, 2000, the Respondent provided information on four of the items and alleged it had no data on the others. On February 23, 2000, the Union requested, inter alia, any information the Respondent had regarding one item that the Respondent alleged was not "readily available." On April 11, 2000, the Respondent provided estimated data on that item.

B. The Judge's Decision

The judge found that the 5-month and 7-1/2-month delays in providing the information rendered the Respondent's responses untimely and in violation of Section 8(a)(5). We disagree with the judge for the reasons that follow.

C. Analysis

In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. "Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). In evaluating the promptness of the response, "the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

Here, we find the General Counsel has not established that the Respondent's procedures and actions were unreasonable in the circumstances of this case. The meter readers information request was made at a time when the Union submitted numerous other information requests, significantly in excess of its previous pattern of such requests, that required substantial amounts of time to address. As noted by the judge, five full-time employees spent hundreds of man-hours gathering the information requested by the Union during the time period covered by the requests in this case.[5] Further, the Union's meter readers information request required the Respondent to search for data as far back as 1991. In addition, the record indicates that the Respondent periodically advised the Union that it was putting together the requested data. Given that the information sought was not time sensitive, we find that it was reasonable for the Respondent to accord a higher priority to other information requests.[6] Considering all of the circumstances surrounding the meter readers information request and response, we conclude that the Respondent did not violate the Act, and we will dismiss this portion of the complaint.

III. INFORMATION REGARDING THE ITRON/HONEYWELL SUBCONTRACT

These alleged violations involve union requests for information regarding a subcontract for meter installations. The judge found that the Respondent violated Section 8(a)(5) by failing to respond timely and failing to provide information. The Respondent has excepted to the judge's finding of the violations. For the reasons set forth below, we agree with the judge.

A. Background

In the fall of 1999, the Union learned that the Respondent contracted with Itron, which, in turn, subcontracted with Honeywell, for new meters to be installed in a union-represented service area. On November 30, 1999, the Union requested a copy of the contract and the installation schedule. On March 22, 2000, the Respondent provided the contract and installation schedule, which indicated that work had begun in March 2000. The parties exchanged some more requests and information, in which the Respondent asserted that, due to the short amount of time available to perform a large volume of

[5] We also note that the official responsible for responding to information requests changed in the middle of the 5-month period between the request and the initial written response.

[6] The nonsensitive nature of the material is significant to our decision. We reach a different result, below, where there was a shorter delay in providing time sensitive material.

work, it subcontracted the work because of the existing workload of meter technicians.

On June 12, 2000, the Union requested, inter alia, (1) the days and number of hours the contractor performed meter work in the territories of the union-represented meter technicians; (2) which, if any, unit employees were resource-shared out of locations where, and around the time when, the contractor performed work;[7] (3) which, if any, unit employees were resource-shared out from any location while the contractor performed work; and (4) the staffing levels compared to those listed in the contract.[8] On July 24, 2000, the Respondent replied and stated, inter alia, that it did not have the information for item (1); provided information only on meter technicians for items (2) and (3) because they assertedly were the only ones qualified to do the work; and asserted there were no contract staffing levels, as requested in item (4), because the work done to date was mostly in the area of former Local 331, which had merged with the Union. In an August 18, 2000 letter, the Union asserted that the Respondent did not try to get the information in item (1); contended that unit employees other than meter technicians might be able to do the work and, therefore, it renewed its request for items (2) and (3); and advised that the Local 331 contract had staffing levels listed in a side agreement and, therefore, renewed its request for the information in item (4). On January 15, 2001, the Respondent provided some information for item (1), i.e., the contractor's man-hours.

B. The Judge's Decision and the Respondent's Exceptions

The judge found that the Respondent's response to the request for the Itron contract was untimely, in violation of Section 8(a)(5) of the Act. The almost 4-month delay in providing the contract and the attached installation schedule prevented the Union from taking any action before the contract work began. Regarding the June 12 and August 18, 2000 requests, the judge found that the Respondent's provision of the man-hour data was not unreasonably delayed in the circumstances, but that its failure to provide resource-sharing data on employees other than meter technicians violated Section 8(a)(5) of the Act. The judge's recommended Order requires the Respondent to provide the Itron information requested in the November 30, 1999, June 12 and August 18, 2000 requests.

In its exceptions the Respondent contends not only that its actions did not violate the Act in any manner, but that the judge's decision does not find a violation for its failure to provide the Union with staffing-level data requested in the June 12 and August 18, 2000 letters. The General Counsel contends that the judge did find a violation regarding the staffing-level data.

C. Analysis

We adopt the judge's finding of violations for the reasons set forth in his decision.[9] With respect to the parties' dispute over the staffing-level data, we conclude that although the judge did not explicitly address this issue, implicit in his decision is a finding that the Respondent violated Section 8(a)(5) by refusing to provide this information. The staffing-level information that the Union requested in item (4) is relevant for the same reason the judge found the resource-sharing data requested in items (2) and (3) to be relevant (i.e., the Union's "major and ongoing concern" with subcontracting). In addition, the staffing-level information is distinct from the man-hour information requested in item (1), which the judge found that the Respondent timely provided to the Union. Finally, the judge's recommended Order, requiring the Respondent to provide "the information requested on . . . June 12, 2000 and August 18, 2000 regarding the . . . Itron meter installation program," is broad enough to encompass the staffing-level data.[10] For these reasons, we adopt the judge's implicit finding that the Respondent violated Section 8(a)(5) and (1) by failing to furnish the Union with the staffing-level data.[11]

IV. INFORMATION REGARDING EMPLOYEE PHIL COSNER

This alleged violation involves union requests for information regarding an investigation into an altercation between two employees. The judge found that the Respondent violated Section 8(a)(5) by making blanket claims of confidentiality, but accommodated the Union's

[7] As stated in sec. 1, supra, the "Resource Sharing" provision of the parties' most recent contract granted the Respondent the right to assign unit employees where they were needed in order to reduce reliance on outside contractors.

[8] In its letter, the Union explained that it wanted to know if unit employees were available for the meter work or could have been cross-assigned to perform it.

[9] We particularly note that, in contrast to the Cumberland and Oakland, Maryland data request, in this instance the information sought by the Union in its request of November 30, 1999, was time-sensitive. (By the time of the Respondent's initial response 4 months later, the meter installation work was already underway.)

[10] As noted above, the judge also ordered the Respondent to provide the information set forth in the Union's request of November 30, 1999. However, as the judge acknowledged, that information was provided on March 22, 2000. Although we agree with the judge that the delayed submission of this information was unlawful, we find it unnecessary to order that it be provided again. We will modify the recommended Order accordingly.

[11] We note that following the Union's August 18, 2000 assertion that a contractual staffing level existed in a side agreement, the Respondent has not continued to deny the existence of such a staffing level.

request with the information it eventually provided. The Respondent has excepted to the judge's finding of the violation. The General Counsel and the Union have excepted to the judge's failure to order the Respondent to provide further information. For the reasons set forth below, we disagree with the judge's finding that the Respondent violated the Act regarding this allegation.

A. Background

In early 2000, employee Phil Cosner discussed with his supervisor a workplace altercation with another employee. Subsequently, the Respondent investigated the incident and required both Cosner and the other employee to undergo psychological evaluation by its employee assistance program provider, Gateway Rehabilitation Center.

On April 14, 2000, the Union filed a grievance regarding Cosner's forced psychological examination. On April 19, 2000, the Union requested copies of all notes, statements, and other documents related to Cosner's conduct, Cosner's reports of other employees' conduct, or any related investigation. Cosner's waiver permitting release of the information to the Union was attached to the Union's request. At no time, however, did the Union furnish the Respondent with a release from the other employee involved in the altercation.

On May 10, 2000, the Respondent refused to provide the requested information on the ground that all employee investigations are confidential. On June 2, 2000, the Union requested that the Respondent identify all related documents in existence. On July 10, 2000, the Union requested information on what other employees had been sent for psychological evaluations in the past 5 years. On July 27, 2000, the Respondent advised the Union that no discipline was issued as a result of the Cosner incident, and that no reports were placed in personnel files. Acknowledging the existence of an investigative report, the Respondent asserted that it was confidential. The Respondent also reported that it did not have, or intend to obtain, the psychological evaluations done by Gateway. On November 9, 2000, the Respondent provided the Union with a summary of what it had discovered during its investigation.

B. The Judge's Decision and the Parties' Exceptions

The judge found that the Respondent's blanket claims of confidentiality violated Section 8(a)(5) of the Act by preventing the parties from reaching a timely accommodation regarding the Union's request. As discussed more fully below, the judge implicitly found that the Respondent's November 9, 2000 letter accommodated the Union's interests, but indicated that he did not believe that the accommodation came "early" enough. The judge also concluded that the Respondent need not produce its investigative report because it was created after the Union filed its grievance and has "no apparent connection" to the forced psychological examination. The Respondent excepts to the finding that its confidentiality claims violated the Act. The General Counsel and the Union except to the judge's failure to order the Respondent to provide the investigative report to the Union. For the reasons set forth below, we find that the Respondent's actions concerning the Cosner matter in no way violated the Act.

C. Analysis

A liberal-type discovery standard applies when relevant or probably relevant information is sought by a union. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The initial inquiry, therefore, focuses on the relevance of the requested information. In this case, the judge found that the investigative report was not relevant because it was created after the Union filed its grievance and was not connected to the subject of the grievance. We disagree with the judge on this point.

The Respondent apparently created the investigative report after the Union filed its grievance. The report, however, memorializes the investigation of an employee altercation. The investigation led the Respondent to require two employees, including Cosner, to submit to psychological examinations. Accordingly, the investigative report contains information directly relevant to the Union's concern about the circumstances in which the Respondent will order such examinations.

Having found the investigative report to be relevant to the Union's grievance, we turn next to the issue of confidentiality. It is well settled that substantial claims of confidentiality may justify refusals to furnish otherwise relevant information. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). It is also well established that the "party asserting confidentiality has the burden of proof." *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). "Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation" between the union's needs and the employer's legitimate interests. Id. In addition, "confidentiality claims must be timely raised" in order to permit the parties a fair opportunity to reach the desired accommodation. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995).

Here, the Respondent raised its claim of confidentiality in its initial response to the Union's request for the report. In finding no violation of the Act, we note that the Respondent stated its confidentiality concern at the outset and repeated that concern when responding to subsequent union demands on the matter. Indeed, under the

precedent cited above, a respondent normally must advance its claim of confidentiality in its response to the union information request.

Our dissenting colleague asserts that the judge dismissed this allegation solely on the grounds of nonrelevance. We disagree. The judge never said that this was his only basis for dismissal. Further, the record strongly suggests that the judge *did* consider the confidentiality defense and accepted it. At the hearing in this matter, the Respondent provided the investigative report to the judge. The judge reviewed it in camera. He determined that the Respondent's November 9, 2000 letter, which summarized the contents of the investigative report accommodated the Union's need for the information while preserving from disclosure the report itself. Absent a finding that the information was confidential, the judge would have had no need to discuss the Respondent's accommodation of the Union's request for the report. Thus, contrary to our dissenting colleague, we conclude that the judge considered and found confidentiality. He did so based on an in camera inspection of the investigative report and on a finding of accommodation.

Further, the fact that the judge found nonrelevance does not mean that he failed to consider the defense of confidentiality. Although the judge could have stopped his analysis upon his finding of nonrelevance, he did not do so. Like any prudent judge, he realized that the Board might disagree on the relevance issue and would want to consider the issue of confidentiality.

Our dissenting colleague questions the proposition that the investigative report contained matters of a confidential nature. However, the report was reviewed by the judge in camera and found to contain confidential information. Further, it led directly to a psychological examination of Cosner. Thus, there is at least a reasonable inference that the report contained matters of a highly sensitive nature which caused the Respondent to question Cosner's psychological fitness for continued employment.

Finally, our colleague ascribes to us the view that "the Respondent, without ever establishing the existence of sensitive or confidential information, would never have to disclose its reasoning or standards." That is not our view. As discussed above, the Respondent has established the existence of sensitive and confidential information. Further, there may be ways to set forth the standards for requiring a psychological examination without disclosing the report itself. However, in this case, the Union sought the report itself.

The final issue is whether the judge correctly held the Respondent in violation of the Act based on the 6-month period of time that elapsed between the Union's information request and the Respondent's furnishing of the November 9, 2000 letter. In the circumstances of this case, where numerous information requests were being processed, where the Respondent had legitimate concerns about the confidentiality of the Cosner information in particular, and where the Respondent continued to correspond with the Union about its concerns, we do not find the delay to be unwarranted or unreasonable. See *Dallas & Mavis Forwarding Co.*, 291 NLRB 980, 983–984 (1988), enfd. mem. 909 F.2d 1484 (6th Cir. 1990) (7-month delay in furnishing information justified by the employer's legitimate confidentiality concerns; parties remained in continuous contact over how the information might be provided). Accordingly we will dismiss this complaint allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, West Penn Power Company and the Potomac Edison Company d/b/a Allegheny Power and Allegheny Energy Supply Company, LLC, a single employer, and their agent Allegheny Energy Service Corporation, Greensburg, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to provide Utility Workers Union of America System Local 102, AFL–CIO (the Union) with information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) Refusing to provide timely responses to Union requests for information that are necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the subcontracting information requested on September 22 and November 1, 1999, and March 7, July 6, and August 18, 2000.

(b) Provide the Union with the information requested on June 12 and August 18, 2000, regarding the ELRI/Itron meter installation program.

(c) Within 14 days after service by the Region, post at its facilities in Pennsylvania, West Virginia, Maryland, and Virginia copies of the attached notice marked "Ap-

pendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1999.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that paragraphs 13(a), (c), (e), and (f) of the complaint are dismissed.

MEMBER WALSH, dissenting in part.

Contrary to my colleagues, I would find that the Respondent violated Section 8(a)(5) of the Act by refusing to provide the Union with the investigative report involving employee Phil Cosner's altercation with another employee. Like the majority, I find that the report was relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees. And, as acknowledged by the majority, "[t]he party asserting confidentiality has the burden of proof." *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). The burden of proof is not satisfied by a blanket claim of confidentiality, but must involve "a more specific demonstration of a confidential interest in the particular information requested." *Washington Gas Light Co.*, 273 NLRB 116, 117 (1984). I find that the Respondent has not met its burden.[1]

In determining whether an employer has met its burden, the first factor to be considered is whether the information sought is sensitive or confidential in nature. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 319–320 (1979); *New Jersey Bell v. NLRB*, 720 F.2d 789, 791 (3d Cir. 1983). The record in this case does not support a finding that the investigative report contained information of a sensitive nature. Although the Respondent has asserted the confidential and sensitive nature of the data repeatedly, there is simply no evidence in the record supporting that claim.

The investigative report was not made a part of the record in this proceeding and therefore cannot be examined by the Board or a court to evaluate the bare claim of confidentiality. Moreover, the Respondent has not even explained the allegedly sensitive nature of the information contained in the report. The Respondent did allow the judge to review the document in camera during the hearing. And although the judge may have implicitly found the report to contain sensitive information, there are two flaws in relying on the judge's in camera review of the report to find that it, indeed, contains confidential information.

First, the judge did not make an explicit finding on the matter; the majority assumes that he deemed the report to be of a sensitive nature because he found that the Respondent need not provide it to the Union. The majority also cites the judge's finding that the Respondent's November 9, 2000 letter accommodated the Union's request as likewise suggesting a determination that the report contained sensitive and confidential material. The judge's ultimate conclusion on this subject, however, was that the report was not relevant to the Union's grievance. If the report was not relevant, according to the judge, then any "implicit" finding that the judge may have made about the sensitive nature of the information in it was wholly unnecessary to his decision.[2]

Second, even assuming that the judge's in camera inspection of the report convinced him the Respondent's confidentiality claim was legitimate, there is no basis for reviewing the judge's evaluation. The judge provided no supporting reasoning, either on the record or in his decision.[3] Further, as stated above, the report is not a part of

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Because I would find the violation based on the Respondent's failure to establish the confidentiality of the investigative report, I find it unnecessary to address whether the Respondent's November 9, 2000 letter either timely or adequately accommodated the Union's request for information.

In all other respects I agree with my colleagues' decision, except that I find it unnecessary to pass on the issues of whether the Respondent violated Sec. 8(a)(5) by failing to timely provide (i) the survey on other utilities' pay rates for foreign utility work, and (ii) the Maryland meter readers information. The finding of such additional violations would be cumulative and would not affect the Order.

[2] My colleagues contend that the judge did not stop his analysis after finding the report to be nonrelevant, but also considered the issue of confidentiality. I believe that they overstate the extent of the judge's brief analysis on this entire issue. Regardless of how the judge might have viewed the nature of the material contained in the document, he made no explicit finding that it was confidential.

[3] My colleagues argue that the record does contain evidence of the investigative report's confidential nature. The mere fact that the Re-

the record and cannot be reviewed by this Board or a court of appeals.[4]

In sum, "by asserting confidentiality, the Respondent assumed the burden of coming forward with evidence to back its position, and it has not done so." *Lasher Service Corp*., 332 NLRB 834 (2000). Instead of record evidence, we have, at most, a gratuitous and unexplained conclusion that is incapable of being meaningfully reviewed. Therefore, I would find that the Respondent has not established its confidentiality defense and that the Respondent's failure to provide the Union with a copy of the investigative report violated Section 8(a)(5) of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to provide Utility Workers Union of America System Local 102, AFL–CIO (the Union) with information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT refuse to provide timely responses to Union requests for information that are necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide the Union with the subcontracting information it requested on September 22 and November 1, 1999, and March 7, July 6, and August 18, 2000.

WE WILL provide the Union with the information it requested on June 12 and August 18, 2000, regarding the ELRI/Itron meter installation program.

WEST PENN POWER COMPANY AND THE POTOMAC EDISON COMPANY D/B/A ALLEGHENY POWER AND ALLEGHENY ENERGY SUPPLY COMPANY, LLC, A SINGLE EMPLOYER, AND THEIR AGENT ALLEGHENY ENERGY SERVICE CORPORATION

JoAnn F. Dempler and *Robin F. Wiegand, Esqs.,* for the General Counsel.

John C. Unkovic and *Darren P. O'Neill, Esqs. (Reed Smith LLP),* Pittsburgh, Pennsylvania; and *Arthur J. Chmiel, Esq.,* Fairmont, West Virginia, for the Respondent.

Burton E. Rosenthal, Esq. (Segal, Roitman & Coleman), Boston, Massachusetts, for the Union.

DECISION[1]

I. STATEMENT OF THE CASE

JERRY M. HERMELE, U.S. Administrative Law Judge. On January 2, 2001, the Acting General Counsel issued an amended complaint alleging that the Respondent, West Penn Power Company and the Potomac Edison Company d/b/a Allegheny Power and Allegheny Energy Supply Company, LLC, A Single Employer, and their Agent Allegheny Energy Service Corporation, violated Section 8(a)(1) and (5) of the National Labor Relations Act by delaying in furnishing and/or failing to respond adequately to six 1999 and 2000 written requests for information from the Union, the Utility Workers Union of America System Local 102, AFL–CIO.[2] In answers filed on January 15 and 16, 2001, the Respondent generally denied this allegation.

So, this case was tried on January 30 and 31, 2001, in Pittsburgh, Pennsylvania, during which the General Counsel called one witness, the Union called two witnesses, and the Respondent called one witness. The General Counsel and the Respondent then filed briefs on April 2, followed by the Union on April 3, 2001.

II. FINDINGS OF FACT

The Respondent, headquartered in Greensburg, Pennsylvania, consists of several entities and is a public utility engaged in the generation and distribution of electricity in various parts of western and central Pennsylvania, western Maryland, West

spondent decided to send employees for psychological examination, however, does not cloak the investigative report with the confidential nature of a psychological exam. The Union was seeking to understand and test the Respondent's reasons for requiring the examinations. Under the majority's theory, the Respondent, without ever establishing the existence of sensitive or confidential information, would never have to disclose its reasoning or standards.

[4] Further, I note that the judge has died in the interim between the issuance of his decision and ours. Therefore, we cannot even inquire into his reasoning on this matter.

[1] Upon any publication of this Decision by the National Labor Relations Board, unauthorized changes may have been made by the Board's Executive Secretary to the original Decision of the Presiding Judge.

[2] Previous versions of the complaint were issued on March 13, October 20, and October 25, 2000.

Virginia and Virginia. In 1999, the Respondent had total operating revenues of $2.8 billion, and annually it purchases and receives interstate goods exceeding $50,000 (G.C. Exs. 1(kk), (vv), (ww); U. Ex. 3). The Union has represented many of the Respondent's employees since at least 1940 and its jurisdiction is similar to the Respondent's service area (Tr. 39, 41). The 1200 represented employees work at four power generating stations in Pennsylvania, at 23 service centers in Pennsylvania, Maryland, West Virginia, and Virginia, and at two "general shops" in Pennsylvania and Maryland (G.C. Ex. 39; Tr. 40, 46–49). The most recent collective-bargaining agreement ran from May 1, 1996 to May 1, 1999, but the parties extended it until April 30, 2001. The contract extension allowed the parties "to meet upon notice and to negotiate in good faith any issues that may arise" (G.C. Exs. 2–3). Over the period of the contract and extension, the Union's Pennsylvania membership declined from 1022 to 896 employees (U. Ex. 1).

William Sterner is the Union's President (Tr. 36). From May 1999 to December 2000, the Union requested information from the Respondent regarding 43 subject areas, which was a substantial increase over previous years. The Company responded in some fashion to all 43 requests, taking five fulltime employees hundred of hours to do so (R. Ex. 2; Tr. 244–45, 376, 381–82, 426, 439, 459). Robert Kemerer responded to the Union's information requests on behalf of the Respondent and he was succeeded in October 1999 by Debra West as Director of Employee Relations (Tr. 364, 366).

Of the 43 subject areas, six are at issue in the instant proceeding. First, on May 5, 1999, Sterner wrote Kemerer to request negotiations to improve employees' pay when they volunteer "with foreign electric utilities during storm restoration." In this regard, Sterner noted that employees are only paid straight time for a 40-hour workweek when working out-of-town, compared to higher rates for other companies' employees doing similar out-of-town work (G.C. Ex. 4). Kemerer responded on July 13 that the Company recognized the Union's request to negotiate this issue (G.C. Ex. 6). In a follow-up letter of September 16, Sterner also expressed concern that employees were being forced to work these assignments (G.C. Ex. 7). And on September 21, he requested detailed information regarding the Company's use of employees for foreign utilities, including "the total number of . . . man hours charged to each foreign electric utility" from 1996 to the present, "the hourly rates actually charged," and "the actual costs incurred" by the Company (G.C. Ex. 9). Sterner suspected that the Respondent was making a profit on this type of work and thus was forcing employees to perform it (Tr. 88–89). On September 28, Kemerer denied that employees were ever forced to perform foreign utility work but conceded that if there were insufficient volunteers "we will, as we have in the past, make this a work assignment" (G.C. Ex. 10). Then, after another Union letter on October 12 requesting cost data (G.C. Ex. 11), West responded on February 11, 2000 by providing data from 1996 to 1999 regarding the foreign utilities assisted, the dates of assistance, the number of employees sent and the total number of man-hours involved. West stated that the Company did not have any information on the hourly rates charged and that billing information regarding third parties was confidential (G.C. Ex. 12). But on April 11, West wrote that billing to foreign utilities includes "payroll overheads" and "administrative overheads" and that the Company's charges to foreign utilities are based on "the general guidelines set forth by EEI [Edison Electric Institute]" which permits reimbursement "for all costs and expenses incurred during the assistance" (G.C. Ex. 14). West then provided these guidelines on June 13 upon checking with EEI after Sterner requested them on April 25 (G.C. Exs. 15–16; Tr. 386–387). Later, on July 31, West wrote:

> Following is the formula that is used when Allegheny bills labor to other utilities that request emergency assistance. Everything starts with the direct labor that is charged to a specific work order. In my June 13 letter, we stated that the direct charge represents the specific job classification of the employee who is sent to the requesting company. However, after further discussion with our accounting department, we found that the charge is actually calculated as the average wages (including overtime) for the employee's responsibility center for the particular pay period when the event occurs multiplied by the number of hours that the employee works for the requesting company. Thus, the average wage varies by responsibility center and changes every two weeks depending on the number of employees in a particular job classification in that service center and the amount of overtime worked during a pay period.
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> Once direct labor is determined, payroll additives (which, as noted in my April 11 letter include 401(k) contributions, taxes, FICA, etc.), employee expenses, transportation costs, and material costs (including stores overheads) are added to the directlabor charges. After all these items are combined, three sets of overheads are applied. The overheads represent costs of doing business and are charged to most of our work orders. They consist of General Overheads that are based on the prior year's administration and general expenses, including supervisory and miscellaneous operations charges; Facilities Overheads that are the allocated costs of office space and office furniture and equipment; and Support Services Overheads which include charges for departments that provide support services, such as Payroll, Human Resources, Telecommunications, etc. The current percentages for these overheads are 34.88%, 3.43%, and 9.53%, respectively.
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> Local 102 employees who participate in the emergency assistance efforts are paid based on Section XIII (Working Hours and Overtime) and any other similar sections of the General Labor Agreement. The pay is no different whether an employee volunteers for the assignment or is forced. And as to your request for work order documents, the Company again respectfully declines to provide any such documents for specific events since we do not provide actual customer charges to a third party.

(G.C. Ex. 18). According to Sterner, however, the above "formula" was "very unclear" (Tr. 97–98). Also, West declined to provide any data regarding the Company's use of other foreign employees in its own service area (G.C. Ex. 18). Then on October 17, West wrote:

> Regarding foreign utilities, we repeat that we do not provide third party billing information since we are under restrictions from the Edison Electric Institute (EEI) about providing information on the agreement. However, we have stated many times that according to our agreement with EEI, we are only allowed to recover our costs when we bill to a third party who has signed up for the agreement. If we charged more than our normal billing, we would be in violation of the Mutual Assistance agreement that we signed. If there were any disputes with the bill, we would have heard from the utility that we charged. Thus, we take offense to your accusations that we are overcharging these utilities that we agreed to help in emergency conditions.

(G.C. Ex. 21). On November 10, West sent information on six other utilities' practices regarding pay for emergency restoration work, and concluded that that those practices were consistent with the Respondent's practice "of using the regular contract rate and provisions of pay" (G.C. Ex. 22).

Second, Sterner wanted information on the Respondent's use of outside contractors because this was work that potentially could have been performed by the Respondent's own employees (Tr. 106). The Respondent had supplied information regarding this subject for many years, pursuant to the following 1977 agreement:

> Specifically, the Company has agreed to amplify upon the identification of the specific work performed and work locations of contractor work. The Company intends to furnish the same of all contractors performing ordinary maintenance and repair-work, as opposed to major construction, which, in the absence of such contractors employees represented by Local 102 ordinarily and customarily perform.
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> Upon specific request by the Local Union president, the Company will furnish similar information and disclosure within its possession on contractors or subcontractors whenever the Union believes, in good faith, it has a specific dispute or grievance on a specific use of contractors.

(G.C. Ex. 30). Indeed, the Respondent provided general annual reports to the Union addressing this subject "for a number of years" (Tr. 391). Also, it provided quarterly "Contractor Information Reports" in 1999 and 2000 a few months after the end of each quarter (G.C. Exs. 26–27, 30, 32–33, 36). Because these reports covered only selected service centers, Sterner requested data in late 1999 and March 2000 for the other service centers as well (G.C. Exs. 28–29, 31). Also, Sterner considered the data which was supplied to be "very general" (Tr. 108, 110). For example, while certain dates for certain contracting jobs were supplied, many contractors were simply described "as needed." So, Sterner asked "whether the failure to supply a monthly report . . . means . . . there was no subcontracting" (G.C. Ex. 31). The Respondent did not answer this query (Tr. 150). On July 6, 2000, the Union's attorney wrote to the Respondent's attorney that "the Union is requesting data on *actual* outside contractor usage, at each facility, by dates, job locations, contractor names/addresses and specific types of work." (G.C. Ex. 34). On July 24, West responded to Sterner that "we are considering the feasibility of refining the form and substance of those reports" (G.C. Ex. 35). But on August 18, Sterner wrote:

> Because the subcontracting data has been so incomplete in the forms we requested, and because the complete information will be harder to piece together as time goes on, we now request as well data processing information for the time periods beginning 1/1/94 (and continuing) to show the trends before and after contract commitments were made. The information would show the amounts of contracting, both by *dollar expenditures* and by *numbers of work units*, including but not limited to accounts payable data. We request that the figures be broken out by *accounting period* (including months and years, if available), by *operational area*, by *location, by vendor*, and by *type* of work, to the extent available. Excluded would be contracts that only cover locations not serviced by 102 members and types of work not performed by 102 people in the past.

(G.C. Ex. 19). Thereafter, West did not attempt to provide the Union with more detailed information, although on November 16, 2000 and January 8, 2001, the Respondent sent outside contracting information for four power stations (G.C. Exs. 37–38; Tr. 489–490).

The Company's meter reader at Cumberland, Maryland are not unionized but the meter readers at Oakland, Maryland are. In the summer of 1999, some Oakland employees complained to Sterner that the Cumberland employees were not following proper procedures, thus enabling them to improve their relative job performance (Tr. 153–54). So, on August 26, Sterner requested the following information:

> The total number of meters in each service center territory
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> The total number of meter readers in each service center. The total number of customers in each service center territory in 1991
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> The total number of customers in each service center territory in 1998. The total number of miles driven by meter readers in 1991 in each service center territory. The total number of miles driven by meter readers in 1998 in each service center territory
>
> The complete approved company procedure for safely changing meters

(G.C. Ex. 40). West responded on January 31, 2000, after the Union filed its charge on December 2, 1999, answering all of the items except numbers three, five and six, claiming that the Respondent did not have this data (G.C. Ex. 1(a); R. Ex. 41). West explained that it took five months to respond because she replaced Kemerer at about this time (Tr. 395-96). Then on April 11, 2000, West wrote that although there was no written policy for changing meters, the Company was creating one. Also, West provided estimates for item six (G.C. Ex. 43).

In the fall of 1999, Sterner learned that the Respondent contracted with Itron, Inc. for new meters to be installed in the Respondent's service area. These new meters would better measure usage through an electric load research initiative (ELRI) (Tr. 157-58). So, on November 30, 1999, Sterner requested a copy of the contract and installation schedule (G.C.

Ex. 44). West provided the contract and schedule on March 22, 2000 (G.C. Ex. 45). In April 2000, Sterner requested more information:

> 1) A copy of the signed contract (and any later contract documents, including amending or supplementing documents) between Allegheny Energy and Itron for ELRI meter installation and data collection services.
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> 2) A complete schedule and timetable for these ELRI meter installations.
>
> 3) Copies of whatever documents describe or refer to the Company's ELRI work and the activities of Itron, including but not limited to advisories and newsletters on the project.
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> 4) for each individual who has been involved with the project, on APS' payrolls or other payrolls (such as Itron's), (a) the name of that individual, (b) the name of the individual's payroll employer, (c) the name of his/her supervisors, (d) the dates of his/her involvement, (e) a description of his/her duties on each such date, and (f) the nature and location of their work when they are not performing the ELRI-related duties on these dates.
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> 5) Copies of communications sent to the Company's customers, including any different versions among customers in different states, and including any reference to the types of personnel that might visit the customer premises.
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> 6) On page 6 of the Contract document there are several references to training and safety issues. What training and what safety requirements are the contractor personnel required to satisfy or required to undergo? What APS training and safety procedures (and what "jointly" worked-on documents or procedures of any sort) are there in relation to ELRI-related work, and when and how have the training or procedures been applied?
>
> 7) Which ELRI-related tasks or skills does the Company consider might be beyond the capability of Company employees? For those items, what training has been provided for Company employees, when, and for which employees?
>
> 8) Page 7 of the initial contract document refers to ID's being provided to contractor employees—apparently APS-related ID's. Exactly what identification materials are being used by or made available to Itron personnel, for each location and type of work, with what specific instructions for usage or limitations? Are the contractor personnel representing themselves in any way as APS-related?
>
> 9) What other non-Company personnel (that is, not on APS payrolls) have been permitted to use identification materials identifying them as Company-connected (in the past 5 years)?

(G.C. Ex. 47). On May 12, West responded to all of these inquiries. Therein, she stated that "due to the large number of installations (1145 meters) that need to be installed in a short period of time (less than 10 months), the company decided to use a contractor because of the existing workload of the Meter Technicians" (G.C. Ex. 48). West's response generated the following June 12 inquiry by Sterner:

> (i) Please tell us, for each of the normal territories of our Meter Techs (Frederick, Hagerstown, etc.), the days and the number of hours (by date and territory) the Honeywell people did their meter work.
>
> (ii) Please tell us if any unit employees were Resource-Shared *out of those same locations* at any points during the same month when you had Honeywell come into our unit areas (and/or the month before and the one after). If so, please tell us *specifics* as to which unit employees, in which classifications, doing what, where and what days.
>
> (iii) Please tell us (for the same months as (ii) above) which unit employees (of any classification) were doing RS assignments *out of our other unit locations*, providing the same specifics.
>
> (iv) Also, what were the staffing levels compared to those listed in the Contract (at any times when employees were being Resource Shared in)? Since your letter says our members' workload was supposedly a key reason for using Honeywell workers, we want to know if there was availability among our people. (APS has said some employees have a lack of work or negative load growth). We hope to find out if some employees were available or could have been cross-assigned to do the meters, instead of bringing in Honeywell meter installers.

(G.C. Ex. 49). West responded as follows on July 24:

> Regarding part (e, i), we do not have a list of specific dates or man-hours from the contractors denoting when they worked for Allegheny Power. However, we know that the contractors were in the Maryland area during most of the month of March and some of April.
>
> In regard to part (e, ii), we only reviewed the Meter Unit employees since they would have been the only ones qualified to do this work. None of the Meter Technicians affiliated with Local 102 in these areas were resource shared during this period.
>
> For part (e, iii), there were two Local 102 Meter Technicians that were doing resource sharing during this time frame, including Harry Taylor from Jefferson who was resource shared to Charleroi and Pleasant Valley during March and April and Mervin Franks from Jefferson who was resource shared to Washington during these same months.
>
> In part (e, iv), you asked for the staffing levels compared to those listed in the contract. The areas where most of the ELRI work has been done this year are in the former Local 331 area, but there were no numbers in the Local 331 contract that referred to Meter Technicians (or any other position). Actually, the Local 331 contract did not allow for Meter Technicians to resource share, and it was only when Locals 331 and 102 combined that Meter Technicians were given the ability to do so.

(G.C. Ex. 51). On August 18, Sterner responded:

> On our item e(i), you did not provide the the [sic]specific information about dates or man-hours. Apparently you made no effort to find out, even from your

> own contractors. Also, the requests should be continuing, not just through April. We still request the information.
>
> On our item e(ii) you are still refusing to give information on anyone except Meter Techs. We are investigating a claim that other classifications could do the work, since there have been crossovers in the past, including Servicemen, substation electricians, etc. You may dispute the claim, but we differ, and we still want the information, because it goes to the important effects of Resource Sharing, both direct and indirect, in diverting to contractors work that could be done by employees.
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> On our item e(iii), the same problem. You are not providing anything but Meter Techs.
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> On our item e(iv), your reason is incorrect for still refusing to supply the information. Local 331 had Staffing Level numbers as well; they were listed in the side letter of January 23, 1998. It should be obvious that the format does not affect our ability to investigate the claims—which means we must first collect information.

(G.C. Ex. 19). Finally, on January 15, 2001, West wrote that:

> We have just received, in December 2000, ours information for the following [four] Maryland . . . service center coverage areas for meter installation work performed by Honeywell. This breakout only covers work completed through September 30, 2000.

West then listed the number of meters and hours for the four Maryland locations (G.C. Ex. 52). According to Sterner, though, this response failed to include any Pennsylvania data or information about the dates the work was performed in Maryland to determine whether the Respondent's own employees would have been available then to perform the work (Tr. 169–71).

Phil Cosner is an employee at the Oakland, Maryland service center. In the spring of 2000, Cosner told Sterner about an altercation he had at work with another employee. After discussing the matter with his supervisor, Wayne Miller, management required him to undergo a psychological examination by Gateway Rehabilitation Center (G.C. Ex. 64; Tr. 174–76, 180). On April 14, the Union filed a grievance about Cosner being forced to undergo this exam, asking that the conduct cease and desist, that any record be expunged, and that Cosner be made whole (G.C. Ex. 54). And on April 19, Sterner wrote the Respondent's General Manager, John Meier, requesting "copies of all notes, statements and other documents related to employee, Phil Cosner's conduct, his reports of other employees' conduct, or any investigation related to those matters." Attached to this request was a signed statement from Cosner that he did not object to the Company's release of this information to the Union (G.C. Ex. 55). But on May 10, Meier replied that "all employee investigations are confidential and are Company property" (G.C. Ex. 56). Then, Sterner wrote to inquire what confidential documents actually existed regarding Cosner and what other employees have been ordered to undergo "psychological evaluations" (G.C. Exs. 57, 59). On July 27, West wrote that no employee was disciplined as a result of the Cosner incident (G.C. Ex. 60), and Kemerer added on November 9 that Cosner and the other employee were and the other employee were simply requested to "discuss the event through our Employee Assistance Program" and that "[m]anagement has not been given any record of either of those discussions" (G.C. Ex. 62). Sterner never received the report from Gateway, despite Cosner's written release to Gateway that the report could be sent to the Respondent (G.C. Ex. 65; Tr. 187–88). Sterner did receive a copy of this release, and the Respondent's letter ordering Cosner to report to Gateway, from the Union, and not from the Respondent (G.C. Exs. 64–65; Tr. 184–86). According to West, neither of these documents were in Cosner's personnel or medical files or in any file maintained by Cosner's supervisor, Wayne Miller (Tr. 402, 404, 451).

10. From 1996 to October 1997, and from July 1, 1998 to July 1, 1999, service center employees working 10-hours days at another service center under the "Resource Sharing" program were allowed to take 10 hours of vacation time for days not worked (Tr. 191–94, 291, 418). The 1996–99 collective-bargaining agreement provided that "[o]ne day will be equivalent to 8 hours unless otherwise noted" (G.C. Ex. 2). The two-year contract extension did not alter this language (G.C. Ex. 3). And the resource sharing program ended on July 31, 1999 (G.C. Exs. 66, 70). In March 2000, 10 to 12 employees, working 10-hour days, attempted to take 10 hours of vacation time but the Respondent permitted only eight hours of leave. So, these employees had to work two hours that day before taking the day off, or lose two hours of pay (Tr. 194, 196, 336, 342–45). These employees then complained to Sterner (Tr. 191–92), whereupon he wrote a letter on April 19 noting that because "the contract language from the general labor agreement alone defines the terms of resource sharing. . .[p]lease verify in writing, the company position on [the 10-hour issue]. . . ." (G.C. Ex. 66). West responded on May 10 that the contract language regarding eight hours now governs in view of the expiration of the resource sharing guidelines (G.C. Ex. 67). On May 24, Sterner then asked for the following:

> 1. The names, dates and starting times of all 102 members who have worked either of the 4–10 (Monday or Tuesday start) schedules while resource sharing since May 1, 1996 to present.
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> 2. Of these members who have worked 10 hour days, lease list the dates on which any of these members have been granted and paid a 10 hour vacation day, 10 hour sick day, 10 hour jury duty, or 10 hour day for a death in the immediate family.
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> 3. Monthly updated staffing levels, by service enter location and position.
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> 4. Monthly reports, by service center location f resource sharing job activity, including the number of workers involved and from where these resources have been shared, and a description of the type of work being done by resource sharing crews.

(G.C. Ex. 69). On August 4, West responded by declining to answer the first two requests because of the burdensome nature of retrieving data back to 1996 (G.C. Ex. 71).

III. ANALYSIS

It is well-settled that, if a union so requests, an employer must provide information that it needs to perform its obligations to represent the employees and to bargain on their behalf. So, if the information is relevant or probably relevant, *i.e.*, a liberal "discovery-type standard," the employer should provide the information to the union. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Further, information concerning terms and conditions of employment is presumably relevant. And such information must be provided within a reasonable time, or, if not provided, accompanied by a timely explanation. *FMC Corp.*, 290 NLRB 483, 489 (1988). However, regarding such information as the employer's financial data, the burden is on a union to establish the relevancy thereof. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Also, an employer may not have to comply with burdensome or bad faith requests by a union, see *AK Steel Corp.*, 324 NLRB 173, 184 (1997), or provide confidential information. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). With these principles in mind, the General Counsel's six allegations regarding the Respondent's failure to provide information and/or timely respond to the Union's information requests will be evaluated.

First, on the foreign utilities issue, the Union requested bargaining to improve employees' pay on May 5, 1999. Then, on September 21, 1999, it requested "the actual costs incurred" by the Respondent in assigning employees to foreign utilities as compared to the total "rates actually charged" those other utilities, to determine whether the Respondent has made a profit on this practice. The Company's response was to admit on September 28 that the lending of employees to foreign utilities was no longer a purely voluntary matter and to provide some data on the number of employees involved. However, the Company has steadfastly refused to provide specific data on what it charges other utilities, other than a general formula indicating that "we are only allowed to recover our costs." The General Counsel contends that this position has "placed the matter of profits in issue," requiring the production of the underlying cost and billing data.

But the position of the General Counsel and the Union puts the cart before the horse. It is well-settled that a union can examine an employer's profit data if the employer claims a financial inability to meet a union's demand for higher wages. However, a union is not entitled to such profit data simply because such data would be helpful to a union, to "bargain intelligently." *F.A. Bartlett Tree Expert Co.*, 316 NLRB 1312, 1313 (1995); *White Furniture Co.*, 161 NLRB 444 (1966). Here, the Respondent never claimed an inability to pay higher wages for the employees assigned to work at foreign utilities. Nor is the Union seeking this profit data to verify whether the employees are being properly paid under an existing contract. Compare *Dallas & Mavis Forwarding Co.*, 291 NLRB 980 (1988) (union entitled to examine underlying tariffs to determine compliance with collective-bargaining agreement). Further, unlike *Hoffman Security*, 315 NLRB 275, 276 (1994), which is cited by the General Counsel, the Union here is hardly "in the dark" regarding what it should seek in terms of higher wages from the Respondent. Indeed, the Respondent provided information on what other utilities have paid for foreign work and how that compares to its own practices. Thus, because the Respondent substantially complied with the Union's information requests, the General Counsel's allegation on this issue will be dismissed.

Second, the parties disagree over the amount and type of subcontracting information provided by the Respondent pursuant to the Union's requests. Since 1977 the Respondent has provided some type of information on this subject, consisting of the "ordinary maintenance and repair" work performed, and the location thereof, within the Union's jurisdiction. But in 1999 and 2000, the Respondent provided quarterly reports for selected service centers only, and failed to state whether the absence of such a report meant that no subcontracting work was performed at all. These deficiencies prompted the Union's August 18, 2000 request for complete data since January 1, 1994 as to dollar expenditures, numbers of work units, time periods, locations, vendors and type of work. This comprehensive request resulted in the Respondent's provision of data on November 16, 2000 and January 8, 2001 for only four power stations. Thus, the General Counsel alleges a failure to respond and/or a delay in responding.

The Respondent's initial defense to this allegation is the claim that the Union failed to inform it of the specific reason the information was needed. In this connection, the Union needs to communicate a reasonable factual basis for its request. *Hertz Corp. v. NLRB*, 105 F.3d 868 (3d Cir. 1997). To be sure, the Union used no magic words to state specifically why it wanted more and better subcontracting information, but in view of the parties' long-running discussion on this subject, since at least 1977, the Presiding Judge believes that the Union's motives in 1999 for obtaining this data were crystal clear to the Respondent, notwithstanding the expiration of the resource sharing provision of the collective-bargaining agreement on May 1, 1999. Indeed, data on subcontracting will no doubt be useful to the Union in negotiating the successor agreement in 2001. As for the Respondent's defense that it had "less information" about this entire subject area since the mid-1990s, it is unclear whether this justification is prospective. Likewise, regarding the claim that obtaining such information since 1994 would be burdensome, it is unclear whether such a claim is being made prospectively, or limited to the period 1999–2000. So, while it is concluded that the Respondent's failure to provide subcontracting information to the Union violated Section 8(a)(1) and (5) of the Act, the Respondent will be ordered to bargain with the Union in good faith to reach an accommodation over the level of detail and time period of data to be provided. *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982).

The third matter of dispute concerns the Respondent's five-month delay in providing information to the Union regarding meters, customers, and meter readers at the Cumberland and Oakland, Maryland service centers, and a seven-and-a-half month delay on one item in the overall request. The General Counsel alleges only delay on this matter and the Respondent offers a potpourri of defenses, including the need to search for data way back to 1991, the Union's other pending information requests in late 1999, and the transition in the personnel department from Kemerer to West at this time.

Because there is no hard and fast time guideline for determining compliance with a union's lawful information request, the reasonableness of the response is determined by the particular facts and circumstances thereof. *Pennco, Inc.*, 212 NLRB 677 (1974). Here, the Union suffered no harm as a result of the Respondent's delay inasmuch as the underlying substantive dispute evaporated upon provision of the information. On the other hand, five-to-seven-and-a-half months are significantly long time periods to wait for a discrete amount of requested information. Also, unlike *Union Carbide Corp.*, 275 NLRB 197 (1985), in which a 10-month delay was found to be reasonable, the Respondent apparently made no effort to address the Union's requests on this subject immediately. Therefore, it is concluded that the Respondent's delay violated Section 8(a)(1) and (5) of the Act, and accordingly, the Respondent will be ordered to cease all such future dilatory behavior.

Fourth, there is the dispute regarding the Union's information request regarding the Respondent's subcontract with Itron and Honeywell to install new meters in the Respondent's service area from 1999 to 2000. After the Union learned of this project, it requested information on November 30, 1999. The Respondent then replied on March 22, 2000, which generated additional union requests and additional company responses through January 2001.

At the outset, it is concluded that the Respondent's initial and subsequent responses to the various union information requests were untimely. Significantly, by the time the Respondent initially responded on March 22, 2000, a lot of the meter installation work was over. Thus, the four-month delay resulted in a fait accompli for the Respondent, mooting portions of any substantive dispute the Union might have had with respect to this particular subcontract. And, an already discussed supra, subcontracting was a major and ongoing concern for the Union. As for the Respondent's claim that it did not have this information until March 2000 and obtained it from the subcontractor as soon as it could, this explanation ignores the fact that the Respondent signed the project agreement on October 6, 1999 and presumably retained a copy. Therein was the meter installation schedule for the Respondent's service area from March to August 2000; information the Union certainly could have used in October 1999, as opposed to four months later. Turning to the Respondent's substantive response, it appears that the subcontractor has been slow in providing data on the actual number of manhours expended on the project. So, the Respondent's January 15, 2001 response on this matter seems reasonable. However, the Respondent has continued to avoid disclosing anything about employees, other than meter readers, thus blocking the Union's effort to determine whether the entire subcontracting project was objectionable. Accordingly, the Respondent will be ordered to provide this information.

Fifth, the Union filed a grievance over the Respondent's requirement that employee Phil Cosner undergo a "psychological examination" after a fight with another employee. Thereafter, the Union requested "all notes, statements and other documents" from the Respondent concerning this matter, but the Respondent immediately, and repeatedly, declined on the grounds of confidentiality. The Respondent also declined to provide this information because it had been destroyed, except for the investigative report, following the decision not to discipline Cosner.

Both parties have overreached on this subject. In the Presiding Judge's view, the Respondent's blanket claim of confidentiality, asserted early and often because of "highly personal, private . . . matters" (G.C. Ex. 60), was unjustified because it deprived the parties of seeking an early accommodation on the Union's request. See *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995). Indeed, according to the General Counsel, such an accommodation occurred six months after the Union's initial information request with the Respondent's disclosure of a summary of the investigative report. Thus, the Respondent will be ordered to cease and desist such future melodramatic refusals. As for the one remaining document sought by the Union, the investigative report, the Presiding Judge concludes that this need not be produced. Simply put, this report, which was created *after* the Union grieved the Respondent's order to Cosner that he submit to a psychological examination, has no apparent connection to this allegedly objectionable practice.

The sixth and final area of dispute concerns the Union's request for information on employees who have worked 10-hour days "while resource sharing since May 1, 1996 to present" in connection with the Respondent's revised January 1, 2000 policy which treats all employees as having worked eight-hour days. The Respondent answered the Union's initial request to explain whether the eight-hour policy was back in effect as of January 1, 2000, but declined to provide the above-requested data back to 1996 on grounds of burdensomeness. The Presiding Judge agrees with the Respondent. The Union's request seeks voluminous information on the leave records of employees for the past five years, for no reason other than to confirm the obvious: that before January 1, 2000, the Respondent allowed employees working a 10-hour day to take 10 hours of leave per day. So the General Counsel's allegation on this matter will be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, West Penn Power Company and the Potomac Edison Company d/b/a Allegheny Power and Allegheny Energy Supply Company, LLC, a Single Employer, and their Agent Allegheny Energy Service Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, Utility Workers Union of America System Local 102, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1) and (5) of the Act by failing to provide the Union with certain information regarding foreign electric utilities, as alleged in paragraphs 13(a) and 14 of the Acting General Counsel's amended complaint.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by delaying in furnishing and failing to respond adequately to the Union's requests for contracting information, as alleged in paragraphs 13(b) and 14 of the complaint.

5. The Respondent violated Section 8(a)(1) and (5) of the Act by delaying in furnishing to the Union certain meter related

information, as alleged in paragraphs 13(c) and 14 of the complaint.

6. The Respondent violated Section 8(a)(1) and (5) of the Act by delaying in furnishing and failing to respond adequately to the Union's information request regarding the ELRI/Itron meter installation program, as alleged in paragraphs 13(d) and 14 of the complaint.

7. The Respondent violated Section 8(a)(1) and (5) of the Act by failing to respond adequately to the Union's request for information regarding employee Phil Cosner, as alleged in paragraph 13(e) and 14 of the complaint.

8. The Respondent did not violate Section 8(a)(1) and (5) of the Act by failing to furnish the Union with information regarding the 10-hour vacation issue, as alleged in paragraphs 13(f) and 14 of the complaint.

9. The unfair labor practices of the Respondent, set forth in paragraphs 4, 5, 6, and 7, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]